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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91161603
Party	Plaintiff Allergan, Inc. Allergan, Inc. 2525 Dupont Drive Irvine, CA 92612
Correspondence Address	SUSAN J. HINCHEY CORPORATE TRADEMARK DEPT. 2525 DUPONT DR IRVINE, CA 92612-1599
Submission	Opposer's Notice of Motion and Motion to Compel Responses to its First Sets of Interrogatories and Requests for Production of Documents and Things; Declaration of K. Wilton in Support of Opposer's Motion to Compel Responses to its First Sets of Interrogatories and Requests for Production of Documents and Things
Filer's Name	Kenneth L. Wilton
Filer's e-mail	kwilton@seyfarth.com, kelko@seyfarth.com
Signature	/Kenneth L. Wilton/
Date	06/14/2005
Attachments	Opposer's Notice of Motion and Motion to Compel.pdf (7 pages) Decl of Wilton in Support of Opposer's Motion to Compel.pdf (13 pages)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 78/320,975
Published in the Official Gazette on August 3, 2004

ALLERGAN, INC.,

Opposer,

v.

BIOCENTRIC LABORATORIES, INC.,

Applicant.

Opposition No. 91161603

CERTIFICATE OF ON-LINE FILING

I hereby certify that this paper was filed on-line with the
Trademark Trial and Appeal Board on June 14, 2005


Eleanor Elko

**OPPOSER'S NOTICE OF MOTION AND MOTION TO COMPEL RESPONSES TO ITS
FIRST SETS OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF
DOCUMENTS AND THINGS**

TO APPLICANT:

PLEASE TAKE NOTICE that pursuant to Rule 2.120 of the Trademark Rules of Practice, opposer Allergan, Inc. ("Opposer") hereby moves the Trademark Trial and Appeal Board for an order compelling responses, without any objections, by applicant BioCentric Laboratories, Inc. ("Applicant") to Opposer's first sets of interrogatories and requests for production of documents and things, and production of responsive documents and things, without any objections.

This motion will be based upon this Notice, the attached brief in support of the motion, the accompanying declaration of Kenneth L. Wilton and exhibits thereto, including copies of Opposer's first sets of interrogatories and requests for production of documents, those facts of

which the Board may take judicial notice, and such other argument and evidence as may be presented to the Board on this motion.

Dated: June 14, 2005

Respectfully submitted,

SEYFARTH SHAW LLP

By: 

Kenneth L. Wilton
Attorneys for Opposer
ALLERGAN, INC.

2029 Century Park East, Suite 3300
Los Angeles, CA 90067-3063
Telephone: (310) 277-7200
Facsimile: (310) 201-5219

OPPOSER'S BRIEF IN SUPPORT OF ITS MOTION TO COMPEL

INTRODUCTION AND BACKGROUND FACTS

Opposer owns various registrations of the "BOTOX" trademark in the United States and in this proceeding has opposed Applicant's application to register "SEATOX" for goods identified as "cosmetic."

On April 4, 2005, Opposer served its first sets of interrogatories, requests for production of documents and things, and requests for admission on Applicant by mailing copies to Applicant at the address of record. Wilton Decl. ¶ 2; Ex. 1.¹ Applicant's responses to that discovery were due to be served on or before May 9, 2005, but to date no responses have been received by Opposer. Wilton Decl. ¶ 2. On June 8, 2005, Opposer's counsel forwarded to Applicant a letter regarding Applicant's failure to timely respond to the discovery and to produce the requested documents, and requesting that Applicant contact Opposer's counsel to discuss the reasons for that failure. Wilton Decl. ¶ 3; Ex. 2. Applicant has not responded to that letter. Wilton Decl. ¶ 3.

This is not the first time Applicant has failed to follow the Trademark Rules of Practice or the Federal Rules of Civil Procedure. When this opposition was filed by Opposer and served by the Board, Applicant failed to timely respond to the Opposition and a Notice of Default was served on October 27, 2004. In response, Applicant filed (but did not serve) a late answer and an explanation that Applicant had filed for an extension of time to *oppose* rather than requesting more time to respond to the Opposition. *See*, Applicant's November 2, 2004 letter to the Board. While the Board accepted the answer, it specifically stated that "Applicant is reminded that it

¹The requests for admission are not before the Board on this motion, as they are automatically deemed admitted under Rule 36 of the Federal Rules of Civil Procedure on the basis of Applicant's failure timely to respond to them.

will be expected to comply with all applicable rules and Board practices during the remainder of this case.” Board’s March 10, 2005 Order, p. 3. Applicant therefore has no excuse for failing to understand and follow the rules, and respond to discovery in this proceeding.

ARGUMENT

THE BOARD SHOULD ORDER APPLICANT TO RESPOND TO THE OUTSTANDING DISCOVERY REQUESTS WITHOUT ANY OBJECTIONS AND SHOULD EXTEND THE PERIOD FOR DISCOVERY AFTER DISPOSITION OF THIS MOTION TO PERMIT OPPOSER TO CONDUCT FOLLOW-UP DISCOVERY.

Rule 2.120(e)(1) of the Trademark Rules of Practice provides, in pertinent part, that “[i]f a party . . . fails to answer . . . any interrogatory, or fails to produce and permit the inspection and copying of any document or thing, the party seeking discovery may file a motion before the Trademark Trial and Appeal Board for an order to compel . . . an answer, or production and an opportunity to inspect and copy.” 37 C.F.R. § 2.120(e)(1). The motion “must be supported by a written statement from the moving party that such party or the attorney therefor has made a good faith effort, by conference or correspondence, to resolve with the other party or the attorney therefor the issues presented in the motion and has been unable to reach agreement.” *Id.* Opposer has satisfied these requirements and its motion to compel should be granted.

I.

OPPOSER HAS MADE A GOOD FAITH EFFORT TO RESOLVE THIS DISCOVERY DISPUTE.

Where “there has been a complete failure to respond to discovery, the party seeking discovery has a duty under [Rule 2.120(e)(1)] to contact his opponent to ascertain why there has been no response and whether the matter can be resolved amicably. If the party seeking discovery is not satisfied with his opponent’s answer to this inquiry, he may then file a motion to compel, supported by the statement required by [Rule 2.120(e)(1)].” *MacMillan Bloedel Ltd. v. Arrow-M Corp.*, 203 USPQ 952, 959 (TTAB 1979); *see also Environtech Corp. v. Compagnie*

des Lampes, 219 USPQ 448 (TTAB 1979) (telephone conference with counsel for non-moving party sufficient to satisfy obligations under Rule 2.120(e)(1)).

Opposer's counsel contacted Applicant in writing regarding the reasons for Applicant's failure to respond to Opposer's discovery requests and received no response. This action is more than sufficient to satisfy Opposer's obligations under Rule 2.120(e)(1).

II.

THE BOARD SHOULD ORDER APPLICANT TO RESPOND TO OPPOSER'S FIRST SETS OF INTERROGATORIES AND PRODUCTION REQUESTS WITHOUT ANY OBJECTIONS, AND TO PRODUCE RESPONSIVE DOCUMENTS AND THINGS WITHOUT ANY OBJECTIONS BY COPYING THEM AND MAILING THEM TO OPPOSER'S COUNSEL.

"Under the Board's discovery practice, a party who fails to respond to a request for discovery during the time allowed therefor is deemed to have forfeited its right to object to the request on its merits unless [it] can show that failure to timely respond was the result of excusable neglect." *MacMillan Bloedel Ltd.*, *supra*, 203 USPQ at 953, citing *Crane v. Shimano Industrial Co., Ltd.*, 184 USPQ 691 (TTAB 1975); *see also* TBMP §§ 405.04(a), 406.04(a); *No Fear Inc. v. Rule*, 54 USPQ2d 1551, 1555 (TTAB 2000).

Applicant cannot possibly show excusable neglect given the fact that it has repeatedly failed to follow the Rules of this Board, and has been specifically warned that it was required to do so. As a result, the Board should exercise its discretion to order Applicant to answer Opposer's first set of interrogatories without any objections and to order Applicant to respond to Opposer's first set of requests for production of documents and things, and to produce all responsive documents and things, without any objections, by copying them at Applicant's expense and mailing them to Opposer's counsel.

Although the filing of this motion will result in a suspension of proceedings with respect to all matters not germane to the motion, Opposer respectfully requests that upon resumption of

the proceedings, the Board extend the period for discovery to permit Opposer to conduct follow-up discovery after receipt of Applicant's responses to Opposer's first sets of interrogatories and requests for production of documents and things, and Applicant's responsive documents and things.

CONCLUSION

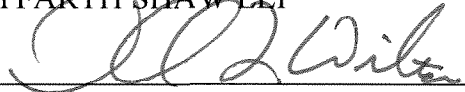
For all of the foregoing reasons, Opposer's motion to compel should be granted in its entirety.

Dated: June 14, 2005

Respectfully submitted,

SEYFARTH SHAW LLP

By: _____


Kenneth L. Wilton
Attorneys for Opposer
ALLERGAN, INC.

2029 Century Park East, Suite 3300
Los Angeles, CA 90067-3063
Telephone: (310) 277-7200
Facsimile: (310) 201-5219

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2005, I served the foregoing Opposer's Notice of Motion and Motion to Compel Responses to Its First Sets of Interrogatories and Requests for Production of Documents and Things on the applicant by depositing a true copy thereof in a sealed envelope, postage prepaid, in First Class U.S. mail addressed to applicant as follows:

Ms. Rebecca Spaar
Chief Executive Officer
BioCentric Laboratories, Inc.
10749 Owens Street
Westminster, CO 80021



Eleanor Elko

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 78/320,975
Published in the Official Gazette on August 3, 2004

ALLERGAN, INC.,

Opposer,

v.


BIOCENTRIC LABORATORIES, INC.,

Applicant.

Opposition No. 91161603

CERTIFICATE OF ON-LINE FILING

I hereby certify that this paper was filed on-line with the
Trademark Trial and Appeal Board on June 14, 2005.



Eleanor Elko

**DECLARATION OF KENNETH L. WILTON IN SUPPORT OF OPPOSER'S MOTION
TO COMPEL RESPONSES TO ITS FIRST SETS OF INTERROGATORIES AND
REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS**

I, Kenneth L. Wilton, hereby declare:

1. I am a member of the bar of the State of California, and am a member of the firm of Seyfarth Shaw LLP, counsel of record for opposer Allergan, Inc. ("Opposer") in this opposition. I make this declaration on the basis of my own personal knowledge and in support of Opposer's motion to compel responses, without any objections, by applicant BioCentric Laboratories, Inc. ("Applicant") to Opposer's first sets of interrogatories and requests for production of documents and things, and production of documents and things without any objections.

2. On April 4, 2005, Opposer served its first sets of interrogatories, requests for production of documents and things, and requests for admission on Applicant by mailing copies to Applicant at its address of record. Copies of the first sets of interrogatories and first sets of requests for production of documents and things are attached hereto as Exhibit 1. Applicant's response to this discovery was due to be served on or before May 9, 2005. I did not receive a

copy of any responses. I have specifically asked my client whether any responses were received by Opposer, and was informed that as of June 7, 2005, they had not been.

3. On June 8, 2005, I sent via Express Mail a letter to Applicant's Chief Executive Officer, Rebecca Spaar, regarding the fact that Applicant had not responded to the written discovery and demanding an immediate response. A true and correct copy of my June 8, 2005 letter is attached hereto as Exhibit 2. I have not received a response to my letter.

4. Through my correspondence with Ms. Spaar, and in light of Applicant's continued failure throughout this proceeding to comply with the Trademark Rules of Practice and the Federal Rules of Civil Procedure, I have made a good faith effort to resolve the issues regarding Applicant's complete failure to respond to Opposer's first sets of discovery requests and have been unable to reach agreement.

Executed this 14th day of June, 2005 at Los Angeles, California.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

A handwritten signature in dark ink, appearing to read "K. L. Wilton", is written over a horizontal line.

Kenneth L. Wilton

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 78/320,975
Published in the Official Gazette of August 3, 2004

ALLERGAN, INC.,

Opposer,

v.

BIOCENTRIC LABORATORIES, INC.,

Applicant.

Opposition No. 91161603

OPPOSER'S FIRST SET OF WRITTEN INTERROGATORIES TO APPLICANT

Pursuant to Rule 33 of the Federal Rules of Civil Procedure and Rule 2.120 of the Trademark Rules of Practice, opposer Allergan, Inc. hereby propounds its first set of written interrogatories to applicant BioCentric Laboratories, Inc. These interrogatories are to be answered separately and fully, in writing under oath, within 30 days of the date of their service.

DEFINITIONS

For purposes of these requests:

1. "Opposer" means the opposer in this action, Allergan, Inc.
2. "Applicant" means the applicant in this action, BioCentric Laboratories, Inc.
3. "Opposed Application" means Application Serial No. 78/320,975, the application at issue in this action.
4. "Applicant's Mark" means the mark shown in the Opposed Application.
5. "Opposer's Mark" means the mark "BOTOX."

INTERROGATORIES

INTERROGATORY NO. 1:

State the name, title, and address of each person involved in the selection, adoption, and/or clearance of Applicant's Mark.

INTERROGATORY NO. 2:

State the name, title, and address of each person involved in the decision to file the Opposed Application.

INTERROGATORY NO. 3:

State in detail the reasons for selecting Applicant's Mark.

INTERROGATORY NO. 4:

Identify any other marks that were considered as an alternative to Applicant's Mark in the process of selecting, adopting, and clearing Applicant's Mark.

INTERROGATORY NO. 5:

State when and under what circumstances Applicant first became aware of Opposer and/or Opposer's Mark.

INTERROGATORY NO. 6:

Identify the class or classes of consumers to whom Applicant intends to market or promote the products intended to be sold under Applicant's Mark.

INTERROGATORY NO. 7:

Describe all efforts undertaken by or on behalf of Applicant to determine the nature, extent, and duration of any actual use in commerce or existence of marks, other than Opposer's Mark, containing a "TOX" suffix.

INTERROGATORY NO. 8:

State the name and address of any person who has expressed the belief, orally, in writing, or by conduct, that Applicant's Mark is similar to Opposer's Mark, and/or reminded the person of Opposer and/or Opposer's Mark, and as to each person so identified, state the date and substance of his or her statement or act.

INTERROGATORY NO. 9:

State the name and address of any person who has expressed the belief, orally, in writing, or by conduct, that Applicant's goods sold or to be sold under Applicant's Mark originate or are associated with, or are sponsored, authorized or licensed by, Opposer.

INTERROGATORY NO. 10:

Identify by name, date, and title any consumer research, market research, focus groups, studies, or other forms of research regarding Applicant's Mark.

INTERROGATORY NO. 11:

For each of Applicant's responses to each request for admission contained in Opposer's First Set of Requests for Admission served concurrently herewith that is not an unqualified admission, state all facts that support Applicant's response.

Respectfully submitted,

Dated: April 4, 2005

SEYFARTH SHAW LLP

By: 

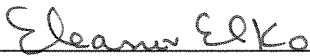
Kenneth L. Wilton
Attorneys for Opposer
ALLERGAN, INC.

2029 Century Park East, Suite 3300
Los Angeles, California 90067-3063
Telephone: (310) 277-7200
Facsimile: (310) 201-5219

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2005, I served the foregoing Opposer's First Set Of Written Interrogatories To Applicant on the applicant by depositing a true copy thereof in a sealed envelope, postage prepaid, in First-Class U.S. mail addressed to the applicant and respondent as follows:

Rebecca Spaar
CEO
BioCentric Laboratories, Inc.
10749 Owens St.
Westminster, CO 80021



Eleanor Elko

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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Applicant.

Opposition No. 91161603

**OPPOSER'S FIRST SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS AND THINGS**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure and Rule 2.120 of the Trademark Rules of Practice, opposer Allergan, Inc. hereby requests that applicant BioCentric Laboratories, Inc. produce for opposer's inspection and copying the documents and things requested below at 10:00 a.m. on May 9, 2005 at applicant's offices at 10749 Owens Street, Westminster, CO 80021, or at such other time and place or by such other means as may be agreed upon by the parties, and that applicant serve a written response to these requests within 30 days of their service.

DEFINITIONS

For purposes of these requests:

1. "Opposer" means the opposer in this action, Allergan, Inc.
2. "Applicant" means the applicant in this action, BioCentric Laboratories, Inc.
3. "Opposed Application" means Application Serial No. 78/320,975, the application at issue in this action.

4. “Applicant’s Mark” means the mark shown in the Opposed Application.
5. “Opposer’s Mark” means the mark “BOTOX.”

REQUESTS FOR PRODUCTION

REQUEST NO. 1:

All documents and things relating or referring to, or evidencing, reflecting, or constituting, Applicant’s selection and adoption of Applicant’s Mark, including, without limitation, all investigations, trademark searches, consumer or other research, and lists of marks and names considered.

REQUEST NO. 2:

All documents and things relating or referring to, or evidencing, reflecting, or constituting, Applicant’s awareness of Opposer, when Applicant selected Applicant’s Mark.

REQUEST NO. 3:

All documents and things relating or referring to, or evidencing, reflecting, or constituting, Applicant’s awareness of Opposer’s Mark, when Applicant selected Applicant’s Mark.

REQUEST NO. 4:

All documents and things relating or referring to, or evidencing, reflecting, or constituting, any correspondence or communication between Applicant and any third party (other than Applicant’s counsel) regarding Opposer.

REQUEST NO. 5:

All documents and things relating or referring to, or evidencing, reflecting, or constituting, any correspondence or communication between Applicant and any third party (other than Applicant’s counsel) regarding Opposer’s Mark.

REQUEST NO. 6:

All documents and things relating or referring to, or evidencing, reflecting, or constituting, the nature, duration, and/or extent of any actual use in commerce or existence of marks, other than Opposer's Mark, containing a "TOX" suffix.

REQUEST NO. 7:

All documents and things relating or referring to, or evidencing, reflecting, or constituting, any consumer research, market research, focus groups, studies, or other forms of research regarding Applicant's Mark.

REQUEST NO. 8:

All documents relating or referring to, or evidencing, reflecting, or constituting, any instance in which any person has expressed the belief, orally, in writing, or by conduct, that Applicant's goods sold or to be sold under Applicant's Mark originate or are associated with, or are licensed, sponsored, or authorized by, Opposer.

REQUEST NO. 9:

All documents relating or referring to, or evidencing, reflecting, or constituting, any instance in which any person has expressed the belief, orally, in writing, or by conduct, that Applicant's Mark is similar to Opposer's Mark, or brings to mind Opposer's Mark.

REQUEST NO. 10:

All documents and things relating or referring to, or evidencing, reflecting, or constituting, any samples, prototypes, mock-ups, models, artist's renderings, or actual production pieces of the goods identified in the Opposed Application sold or to be sold under Applicant's Mark.

REQUEST NO. 11:

All documents and things relating or referring to, or evidencing, reflecting, or constituting, any sales or promotional materials for any of the goods identified in the Opposed Application sold or to be sold under Applicant's Mark, including, without limitation, any catalogs, mailers, promotional literature, brochures, scripts, online advertisements, and other materials.

REQUEST NO. 12:

Representative samples of each form of packaging and labeling for any of the goods identified in the Opposed Application sold or to be sold under Applicant's Mark.

REQUEST NO. 13:

Representative samples of products sold or to be sold containing Applicant's Mark.

Respectfully submitted,

Dated: April 4, 2005

SEYFARTH SHAW LLP

By: _____


Kenneth L. Wilton
Attorneys for Opposer
ALLERGAN, INC.

2029 Century Park East, Suite 3300
Los Angeles, California 90067-3063
Telephone: (310) 277-7200
Facsimile: (310) 201-5219

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2005, I served the foregoing Opposer's First Set Of Requests For Production Of Documents And Things on the applicant by depositing a true copy thereof in a sealed envelope, postage prepaid, in First-Class U.S. mail addressed to the applicant and respondent as follows:

Rebecca Spaar
CEO
BioCentric Laboratories, Inc.
10749 Owens St.
Westminster, CO 80021



Eleanor Elko

Writer's direct phone

(310) 201-5271
Writer's e-mail

kwilton@seyfarth.com

June 8, 2005

VIA EXPRESS MAIL NO. EL123674737US

Ms. Rebecca Spaar
Chief Executive Officer
BioCentric Laboratories, Inc.
P.O. Box 1018
Brighton, CO 90601

Re: *Allergan, Inc. v. BioCentric Laboratories, Inc.*, Opp. No. 91161603

Dear Ms. Spaar:

We are writing with regard to the referenced opposition proceeding currently pending before the Trademark Trial and Appeal Board of the United States Patent Office. In particular, we are writing regarding the written discovery (First Sets of Requests for Production, Requests for Admission, and Interrogatories) we served on your company on April 4, 2005. Under the Trademark Rules of Practice, and the Federal Rules of Civil Procedure, BioCentric's responses to that discovery were due to be served no later than May 9, 2005. To date no response has been received.

As a result of BioCentric's failure to respond to the Requests for Admission, each of those requests has been deemed admitted. *See* Fed.R.Civ.P. 36(a). With regard to the remaining discovery, we demand that BioCentric immediately serve responses and produce the requested documents. Unless we receive those responses and documents in our offices by the close of business on **June 13, 2005**, we will have no choice but to seek an order compelling BioCentric to respond and produce documents.

Anticipating, in part, your response to this letter, we note that on March 10, 2005 the Board specifically cautioned BioCentric about the risks of proceeding without an attorney in this matter. BioCentric therefore has no excuse for failing to timely respond to discovery.

We look forward to receiving BioCentric's responses.

Very truly yours,

SEYFARTH SHAW LLP


Kenneth L. Wilton

KLW:kge

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2005, I served the foregoing Declaration of Kenneth L. Wilton in Support of Opposer's Motion to Compel Responses to Its First Sets of Interrogatories and Requests for Production of Documents and Things on the applicant by depositing a true copy thereof in a sealed envelope, postage prepaid, in First Class U.S. mail addressed to applicant as follows:

Ms. Rebecca Spaar
Chief Executive Officer
BioCentric Laboratories, Inc.
10749 Owens Street
Westminster, CO 80021



Eleanor Elko